Statute of Limitations, and that, though the insured died before the expiration of the prescribed period of time, the death did not fix the rights of the parties, and any defense that the company might have was lost by failure to make contest within the period. Decisions on this point are few, but take this view.[5]

The recent amendments in Illinois and New York provide that the policy shall be incontestable after it has been in force during the lifetime of the insured for a period of two years. It is probable that the legislatures in the many states which require an incontestable clause meant it to have this effect in the first place, but the usual language of the clause certainly justifies the construction placed upon it by the courts. An examination of the various statutes will show that they are really the same in all but minor details. Whether or not other states will make the same change cannot be foretold, though the haste with which Illinois and New York sought to remedy the clause after the decision in the *Ramsey* case would seem to indicate that others would follow suit.[6]

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THE WYOMING CODE OF INSURANCE AND CREDITORS' RIGHTS.—The Code of Insurance recently enacted in Wyoming, Laws 1921, pp. 218, 236, again focuses attention upon the effect of exemption clauses in connection with the Federal Bankruptcy Act as interpreted by *Cohen* v. *Samuels*.[1] The Wyoming Statute provides that the beneficiary of a life policy shall be entitled to the proceeds against the creditors of the person effecting the insurance, whether such proceeds become due on or before the death of the insured, and even if a right to change the beneficiary is reserved to the insured. Exemption provisions of this type are also found in the statutes of many other states.[2]

It is settled that a trustee in bankruptcy is entitled to the cash surrender value of a life policy at the time of adjudication of bankruptcy, and gets title to the policy only if that sum is not paid or secured by the bankrupt.[3] But where the statutes of a state exempt the proceeds of life policies from creditors, the trustee in bankruptcy does not get rights under § 70a5 of the Bankruptcy Act, since § 6, which exempts in general terms all assets exempted by the state, is controlling.[4]

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[5] *Monahan* v. *Metropolitan Life Ins. Co.* (1918) 283 Ill. 136, 119 N. E. 68; *Plotner* v. *Northwestern Nat. Life Ins. Co.* (N. Dak. 1921) 183 N. W. 1000, especially the opinion of Birdzell, *J.*, approving the *Ramsey* case, *supra*, footnote 4, and the *Monahan* case, *supra*. *Ebner* v. *Ohio St. Life Ins. Co.* (1918) 69 Ind. App. 32, 121 N. E. 315, permitted an action by the insurer to cancel the policy, begun several days before the expiration of the period in the clause, and after the death of the insured. It is submitted that if the death were held to fix the rights of the parties, such action would not have been permitted, because there would then have been an adequate defence at law. See also *Clement* v. *Insurance Co.* (1898) 101 Tenn. 22, 27, 28, 46 S. W. 561; (1921) 20 Michigan Law Rev. 111.

[6] It is interesting in this connection to note that the recently enacted Insurance Code in Wyoming, Laws 1921, p. 218, follows the old wording in its specification for an incontestable clause. But *cf.* Mo. Rev. Stat. (1919) § 6181, providing substantially what the amended laws in Illinois and New York have now adopted, except that the period is three years instead of two.

[1] (1917) 245 U. S. 50, 38 Sup. Ct. 36.

[2] See, *e. g.*, Ky. Stat. (Carroll 1915) § 655; Mass. Rev. Laws (1902) c. 118, § 73; Minn. Gen. Stat. (1913) §§ 3465, 3466; N. Y. Cons. Laws (1909) c. 14, § 52.

[3] Federal Bankruptcy Act of 1898 § 70a5, as construed in *Burlingham* v. *Crouse* (1913) 228 U. S. 459, 33 Sup. Ct. 564, and in *Cohen* v. *Samuels, supra*, footnote 1. § 70a5 has no application to policies having no cash surrender value. *Burlingham* v. *Crouse, supra*.

[4] *Holden* v. *Stratton* (1905) 198 U. S. 202, 25 Sup. Ct. 656; *In re Johnson* (D. C. 1910) 176 Fed. 591; *Pulsifer* v. *Hussey* (1903) 97 Me. 434, 54 Atl. 1076 (*semble*). The decision in *Cohen* v. *Samuels, supra*, footnote 1, when read alone, seemingly is that all policies with a cash surrender value go to the trustee.

Therefore under *Holden* v. *Stratton*[6] a trustee in bankruptcy has no right to insurance policies where a state statute provides that such policies shall not be available to creditors, even if the policies have a cash surrender value.

Under § 70a3 of the Act, the trustee succeeds to the " . . . title of the bankrupt . . . to all powers which he might have exercised for his own benefit . . . " This would seem to provide that where the insured reserves a right to change the beneficiary, the trustee under the same right may order that the beneficiary be changed so that the proceeds go to the estate of the insured, which in effect would transfer such policies to the trustee. But the rule is otherwise.[6] There is authority apparently contrary,[7] but an examination will show that all that is decided is that if the state statute does not exempt such policies, then § 70a3 operates.

The important point then is to determine whether the state statute and decisions exempt a policy of any particular nature.[8] Various states interpret their own exemption statutes in widely different ways. For example, it has been held that the type of insurance known as endowment insurance is nothing more than a form of investment, and is not "life insurance" properly within the purview of such statutes.[9] Other cases have decided the opposite.[10] On this point, too, the federal courts, applying § 6 of the Act, will follow the construction placed by a particular state on its own exemption statute.

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LIABILITY INSURANCE: RIGHTS OF INJURED PARTY AGAINST THE INSURER.—Rhode Island, Laws 1921, c. 2094 provides that liability policies, insuring for property damage or personal injury, shall contain a provision that the insurer is directly liable to the injured party. The latter must proceed against the assured, but if he cannot be found, may proceed directly against the insurer. If a judgment against the assured is returned wholly or partly unsatisfied, the insurance company is liable for the deficiency, up to the face value of the policy, at the suit of the holder of the judgment.

So-called liability policies fall into two classes: (1) indemnity insurance; (2) legal liability insurance. Indemnity insurance protects only against actual loss, and payment of a judgment or claim is a condition precedent to recovery from the insurance company.[1] But in legal liability insurance the obligation of the insurer arises at the moment a judgment fixes the legal liability of the assured.[2]

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But the opinion does not mention § 6 of the Act, and an exemption under the state statute on that question was neither involved in nor considered in the case. Moreover, the opinion cites with approval *Burlingham* v. *Crouse, supra,* footnote 3, which in turn approves *Holden* v. *Stratton, supra,* footnote 4, *Cohen* v. *Samuels* would, therefore, seem to be strictly in accord with previous rulings of the Supreme Court.

[6] *Supra,* footnote 4.

[6] *In re Johnson, supra,* footnote 4; *In re Pfaffinger* (D. C. 1908) 164 Fed. 526; see *Allen* v. *Central Wis. Trust Co.* (1910) 143 Wis. 381, 385, 127 N. W. 1003.

[7] *In re White* (C. C. A. 1909) 174 Fed. 333.

[8] If a policy does not come within the state statute, then it is not exempt, and if it has a cash surrender value will go to the trustee. *In re White, supra,* footnote 7; *In re Wolff* (D. C. 1908) 165 Fed. 984.

[9] *Talcott* v. *Field* (1892) 34 Neb. 611, 52 N. W. 400.

[10] *Holden* v. *Stratton, supra,* footnote 4; *In re Booss* (D. C. 1907) 154 Fed. 494.

[1] *Carter* v. *Aetna Life Ins. Co.* (1907) 76 Kan. 275, 91 Pac. 178; see *Anoka Lumber Co.* v. *Fidelity, etc. Co.* (1895) 63 Minn. 286, 292, 65 N. W. 353.

[2] *American Employers' Liability Ins. Co.* v. *Fordyce* (1896) 62 Ark. 562, 36 S. W. 1051; *Anoka Lumber Co.* v. *Fidelity, etc. Co., supra,* footnote 1.